Filed 2/25/19 P. v. C.T.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. C.T., Defendant and Appellant.	A153763 (Contra Costa County Super. Ct. No. J1601043)
In re C.T., a minor, on Habeas Corpus.	A155371

The juvenile court sustained a wardship petition alleging C.T., a minor, committed second degree robbery (Pen. Code, §§ 211/212.5, subd. (c)), a felony. C.T. now appeals from the juvenile court order vacating his dependency status under section 300 of the Welfare and Institutions Code[1] and declaring him a ward under section 602.

C.T. raises the following issues on appeal: (1) the juvenile court did not timely vacate his dependency status under section 241.1 and rule 5.512 of the California Rules of Court,[2] and his rights were violated because his dependency attorney did not participate in the joint assessment conference or at the hearing when the juvenile court

[1] All further statutory references are to the Welfare and Institutions Code unless otherwise specified.

[2] All further rule references are to the California Rules of Court.

terminated his dependency status; (2) the jurisdictional finding should be reversed because the identification evidence admitted against him was obtained in violation of the Fourth Amendment; (3) the evidence of his identification during an in-field show-up should have been excluded as unduly suggestive and unreliable; (4) the in-court identification evidence should have been suppressed because it was tainted by the unduly suggestive in-field identification; (5) the foregoing challenges to the identification evidence should be considered despite not being raised below because counsel rendered ineffective assistance in not raising them; and (6) the jurisdictional finding was unsupported by substantial evidence.

In a consolidated petition for writ of habeas corpus, C.T. contends his attorney's failure to move to suppress and exclude the aforementioned identification evidence deprived him of effective assistance of counsel.

We affirm the orders of the juvenile court, and deny the petition for writ of habeas corpus.

FACTUAL AND PROCEDURAL BACKGROUND

In June 2010, a juvenile dependency petition on behalf of C.T. was filed in Contra Costa County resulting in his removal from his parents' custody and his placement with a grandparent as legal guardian. In January 2017, a supplemental dependency petition was filed in Contra Costa County resulting in C.T.'s removal from his guardian's custody and his placement in foster care beginning in April 2017.

In the meantime, in October 2016, the juvenile court sitting in Alameda County sustained a delinquency petition filed under section 602, finding C.T. committed attempted robbery. The juvenile court adjudged C.T. a ward, placed him on probation, and transferred the matter to Contra Costa County.

On October 24, 2017, a second supplemental wardship petition under section 602 was filed in Contra Costa County, alleging that C.T. committed one count of second degree robbery. C.T. was represented by delinquency counsel throughout the

proceedings on this second supplemental wardship petition. He was detained on October 25, 2017, and the contested jurisdictional hearing took place on November 16 and December 5 and 7, 2017. At the jurisdictional hearing, the prosecution presented evidence that showed the following. In the early morning hours of October 21, 2017, three young African-American males robbed a victim who was walking with a companion along the Ohlone Greenway near the El Cerrito Plaza BART station. The police located and stopped three young males who were walking near the crime scene about 30 minutes afterwards. One of them had the victim's phone in his pocket. During an in-field show-up, the victim identified one of the other males, C.T., as one of the perpetrators. The victim also identified C.T. in court. The juvenile court found the robbery allegation true and sustained the petition on December 7, 2017. When setting the date for disposition, the juvenile court asked that a joint assessment per section 241.1 be conducted.

On December 13, 2017, the probation department and Contra Costa County Children and Family Services (CFS) conducted a joint assessment via conference call pursuant to section 241.1. The participants included a social worker, a CFS manager, a probation supervisor, and a probation officer. These participants agreed the best course would be for the court to terminate C.T.'s dependency status and adjudge him a ward. The probation department's disposition report included information about this joint assessment.

On January 2, 2018, the juvenile court held a disposition hearing. At that disposition hearing, C.T. was represented by his delinquency counsel who stated she believed it was appropriate to terminate C.T.'s non-wardship probation and make him a ward. The court made its status determination per section 241.1, vacating C.T.'s dependency status, and adjudging him a ward. C.T. now appeals and, as to claims not raised on the record below, concerning his detention and identification seeks relief alternatively by petition for writ of habeas corpus.

DISCUSSION

A. Termination of C.T.'s Dependency Status Under Section 241.1

Generally, a minor cannot be both a dependent of the juvenile court under section 300, and a ward of the juvenile court under section 601 or section 602. (§ 241.1, subd. (d); *In re Ray M.* (2016) 6 Cal.App.5th 1038, 1048 (*Ray M.*).) Where a minor appears to qualify as both a dependent and a ward, "section 241.1 sets forth the procedure the juvenile court must follow to determine under which framework the case should proceed." (*Ray M.*, *supra*, at p. 1048.) Section 241.1, subdivision (a), provides: "the county probation department and the child welfare services department shall . . . initially determine which status will serve the best interests of the minor and the protection of society. The recommendations of both departments shall be presented to the juvenile court with the petition that is filed on behalf of the minor, and the court shall determine which status is appropriate for the minor."

Section 241.1's "statutory mandate is 'augmented by rule 5.512, which requires the joint assessment under section 241.1 to be memorialized in a written report.' " (*Ray M.*, *supra*, 6 Cal.App.5th p. 1049.) Rule 5.512 also specifies time lines for conducting joint assessments and status determinations under section 241.1. Namely, the responsible child welfare and probation departments must complete a joint assessment under section 241.1 "as soon as possible after the child comes to the attention of either department" and "[w]henever possible, the determination of status must be made before any petition concerning the child is filed." (Rule 5.512(a)(1), (2).) "If the child is detained, the hearing on the joint assessment report must occur as soon as possible after or concurrent with the detention hearing, but no later than 15 court days after the order of detention and before the jurisdictional hearing." (Rule 5.512(e).) Among others, all attorneys of record must receive notice of the hearing. (Rule 5.512(f).) "All parties and their attorneys must have an opportunity to be heard at the hearing." (Rule 5.512(g).)

However, "the fact that section 241.1 imposes a 'mandatory' statutory duty does not preclude the application of the forfeiture rule. [Citations.] Rather, courts have repeatedly held that a party's failure to object forfeits appellate review of the adequacy of—or the failure to prepare—mandatory assessment reports in juvenile proceedings." (*In re M.V.* (2014) 225 Cal.App.4th 1495, 1508 (*M.V.*); *In re R.G.* (2017) 18 Cal.App.5th 273, 286 (*R.G.*) ["A failure to object below to procedural aspects of the section 241.1 determination forfeits the issue on appeal"].)

Here, C.T. contends the time limits set out in rule 5.512 for conducting the joint assessment and making the status determination were exceeded. Indeed, it appears the rule's time limits were not complied with: the probation department and CFS did not conduct their joint assessment, and the court did not hold a status determination hearing, until after the operative wardship petition was filed, the minor was detained, and the jurisdictional hearing was conducted. However, C.T.—who was represented by delinquency counsel throughout his delinquency proceedings—does not argue, and there is nothing in the record showing, that he or his delinquency attorney objected to the timing of the joint assessment or the court's status determination. As such, the issue was forfeited. (See, e.g., *M.V.*, *supra,* 225 Cal.App.4th at pp. 1507–1508 [forfeiture applied to claims that section 241.1 assessment was untimely and that court violated minor's due process rights by holding jurisdiction hearing without completed section 241.1 report].)

C.T. also argues that his dependency attorney's non-participation in the joint assessment conference and in the status determination hearing violated his right to due process and right to counsel, and denied him the opportunity to be heard under rule 5.512(g). This is unpersuasive. Under section 241.1, only "the county probation department and the child welfare services department" are required to conduct the joint assessment. The statute does not mandate attorney participation. Although rule 5.512(d)(11) provides that "[a] statement by any counsel currently representing the child" should be included in a joint assessment report, the record here does not establish that

dependency counsel was not given the chance to provide such a statement for inclusion in the joint assessment report. Similarly, the record does not show that dependency counsel had no notice or opportunity to be heard at the status determination hearing.
(See Rule 5.512(f), (g).)

We reject C.T.'s claims of error concerning the termination of his dependency status under section 241.1.

B. The Juvenile Court's Jurisdictional Order

1. Background

The following facts are drawn from the testimony of the victim and her companion at the jurisdictional hearing. On October 21, 2017, around 1:00 a.m., the victim and her companion were walking on the Ohlone Greenway near the intersection with Fairmont Avenue when they encountered three young males walking in the opposite direction. All three were young, between the ages of 16 and 24, and African-American. The tallest of the three was about six feet tall and appeared slightly older than the other two, who were somewhere in the range of five feet, six inches to five feet, ten inches. One of the shorter males was wearing a dark hooded sweatshirt with a "GAP" logo across the chest and the hood pulled on.

At some point, the victim and her companion noticed the three males were following them. Feeling threatened, the victim's companion took out his phone to pretend to call someone. Once he pulled out his phone, the tallest of the males tried to grab it. The victim's companion managed to get his phone back into his pocket, but the tallest male attacked him. As the victim reached for her own phone, the two shorter males demanded it, grabbed her arm, and forced her hand open, then ran with the phone across the street near the El Cerrito Plaza BART station. The three males returned moments later and demanded the victim's purse. The victim verbally refused, at which point the males grabbed it. The victim refused to relinquish it. The males pushed her to the ground, kicked and stomped on her several times, and dragged her across the ground

while trying to take the purse. Eventually, for reasons unknown, the males ran off without the purse. The victim and her companion then flagged down a car and called the police, who arrived within approximately five minutes.

Sergeant Jose Delatorre of the City of El Cerrito Police Department testified that he received a call from dispatch regarding the robbery and heard the three suspects described as black males. Sergeant Delatorre heard one of the suspects described as being about 18 to 20 years old, thin, and wearing a black hoodie. Sergeant Delatorre also heard one of the suspects described as six foot tall but could not recall if a height description for the other two was relayed. At the crime scene, Sergeant Delatorre heard the three suspects described as wearing hoodies and backpacks. Officer Kenneth Hashimoto testified that he also received a call from dispatch about the robbery. Officer Hashimoto heard dispatch describe one of the suspects as a tall black adult male, about six feet tall with a black sweatshirt; the other two were described as being five feet, seven inches to five feet, nine inches tall without clothing descriptions.

At this early morning hour, there were no pedestrians on the street and very few vehicles. After about 20 minutes, Sergeant Delatorre saw a subject matching the general description of one of the robbery suspects—a black male, about 18 years old with a thin build wearing a black hoodie, and a backpack—walking westbound on Stockton Avenue towards San Pablo Avenue, about eight blocks from the robbery scene, or 0.7 miles. The subject briefly made eye contact with Sergeant Delatorre, then looked straight ahead. About 30 to 45 seconds later, while the first subject waited to cross San Pablo, Sergeant Delatorre noticed two more subjects—one being C.T.—walking westbound on the other side of Stockton. C.T. was about 10 to 15 yards from the first subject and within 10 to 15 feet of the third. Once the first male began crossing San Pablo, Sergeant Delatorre activated his lights to stop him, and Officer Hashimoto stopped the other two males. Officer Hashimoto testified he saw C.T. first, and did not notice the third subject until he exited his patrol vehicle and told C.T. to sit down. The subject whom Sergeant Delatorre

stopped had the victim's cell phone in his pocket. Officer Hashimoto searched C.T. and found a black ski mask and an uncut vehicle key fob.

The police brought the victim and her companion to where the suspects were detained to do an in-field identification. The victim testified that when the robbery was occurring, she could clearly see the perpetrators' faces, but it was difficult to see the suspects' facial features during the in-field show-up because of the brightness of a spotlight the police were using. Despite the lighting, the victim identified C.T.—who was wearing a GAP hooded sweatshirt—as one of the perpetrators. The victim told the officers she recognized the GAP sweatshirt. The victim's companion testified he also identified the male in the GAP sweatshirt, but based strictly on his recognition of the GAP logo.

During the jurisdictional hearing, C.T. was permitted to remain outside of the courtroom when the victim and her companion described the suspects. After C.T. re-entered the courtroom, the prosecutor asked the victim if she could identify anyone in the courtroom as one of the perpetrators who took her phone. The victim said she recognized C.T. as one of the perpetrators who grabbed her arm while her phone was being taken, and grabbed her purse, but was not sure if he was the one who actually took her phone. The victim testified she recognized C.T.'s face and eyes from when she saw him during the robbery, not the in-field show-up. The victim's companion could not identify anyone in court.

2. Discussion

(a) C.T.'s Fourth Amendment Claim

C.T. contends the jurisdictional finding should be reversed because the identification evidence admitted against him was obtained in violation of the Fourth Amendment. Specifically, he argues Officer Hashimoto lacked reasonable suspicion to detain him based on the general descriptions of the suspects provided by dispatch, thus

evidence of the in-field and in-court identifications of him should have been suppressed as fruits of the detention.

C.T.'s failure to file a suppression motion pursuant to section 700.1 forfeits review of the Fourth Amendment issue. (Cf. *People v. Miranda* (1987) 44 Cal.3d 57, 80.) Nonetheless, C.T. claims we should reach the merits of the issue on appeal because the suppression motion would have been meritorious, and he therefore received ineffective assistance due to his attorney's failure to file such a motion. To prevail on a claim of ineffective assistance, a party must show both that counsel's performance was objectively deficient, and that but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different. (*Strickland v. Washington* (1984) 466 U.S. 668, 687, 697.) Generally, "where counsel's trial tactics or strategic reasons for challenged decisions do not appear on the record, we will not find ineffective assistance of counsel on appeal unless there could be no conceivable reason for counsel's acts or omissions." (*People v. Weaver* (2001) 26 Cal.4th 876, 926.) In this case, the appellate record does not disclose counsel's reasons for not filing a suppression motion, and there may have been a good reason not to do so. Thus, we reject the ineffective assistance claim on appeal.

The issue, however, requires further discussion because C.T. makes the same claim regarding ineffective assistance in his petition for writ of habeas corpus. In his habeas petition, C.T. relies on the following documentary evidence: (1) the appellate record, mainly the record of his jurisdictional hearing; and (2) a declaration from his delinquency attorney, stating only that she did not file a suppression motion because she did not think it would be meritorious. Based on the petition and the record before us, however, we find C.T. fails to establish a prima facie case for relief based on this claim of ineffective assistance of counsel.

Because the legality of the detention was never challenged, facts relevant to a determination of that issue were not developed during the jurisdictional hearing. (See

People v. Mendoza Tello (1997) 15 Cal.4th 264, 267.) For example, it is unclear at what precise moment C.T. was detained. (*California v. Hodari D.* (1991) 499 U.S. 621, 626.) Moreover, C.T. seems to assume that no other circumstances justifying a detention existed (aside from reasonable suspicion), but the record does not clearly establish this.

Although C.T. offers a declaration from his delinquency attorney, her declaration offers no facts disclosing any deficiency in her evaluation that a suppression motion either lacked merit or would not be successful. Moreover, we cannot say from a review of the record that there was no conceivable reason for her omission. What the record shows is the officers saw males that matched the dispatcher's general descriptions of the robbery suspects at around 1:30 a.m., close in time to the robbery itself which occurred at around 1:00 a.m., and about eight blocks from the robbery scene, or 0.7 miles. There were no pedestrians on the streets other than these young males who were walking in the same direction, and close enough to permit the inference they were together regardless of whether or not they were directly interacting. Even general suspect descriptions can give rise to reasonable suspicion justifying a detention when coupled with additional circumstances such as temporal and geographic proximity to a crime scene. (See, e.g., *People v. Overten* (1994) 28 Cal.App.4th 1497, 1504–1505; *People v. Fields* (1984) 159 Cal.App.3d 555, 560–561, 564–566; *People v. McCluskey* (1981) 125 Cal.App.3d 220, 226; *People v. Harris* (1975) 15 Cal.3d 384, 387–389; *People v. Smith* (1970) 4 Cal.App.3d 41, 44–45 & 48–49; *People v. Mickelson* (1963) 59 Cal.2d 448, 452–454.) Given this record, C.T.'s petition and submission of his delinquency attorney's bare bones declaration fail to establish a prima facie case for relief based on the failure to file a suppression motion. (See *People v. Wharton* (1991) 53 Cal.3d 522, 576.) In reaching this conclusion, we find that *In re Tony C.* (1978) 21 Cal.3d 888,[3] *People v. Durazo*

[3] *In re Tony C.*, *supra*, 21 Cal.3d 888 was superseded in part by article I, section 28, of the California Constitution.

(2004) 124 Cal.App.4th 728, and *People v. Hester* (2004) 119 Cal.App.4th 376, do not compel a contrary outcome.

(b) The Identification of C.T.

C.T. contends on appeal that the victim's identification and her companion's identification of him in the field should have been excluded as unduly suggestive and unreliable in violation of his right to due process. He also argues the victim's subsequent in-court identification of him should have been excluded because it was tainted by the unduly suggestive in-field show-up.

As above, these claims were forfeited because C.T. never moved to suppress the identification evidence below. (Evid. Code, § 353; *People v. Cunningham* (2001) 25 Cal.4th 926, 989.) C.T. claims on appeal that he suffered from ineffective assistance due to his attorney's failure to move to suppress this evidence. The record, however, does not disclose counsel's reasons for not filing such a motion, and there may well have been a professionally sound reason not to do so. (*Weaver*, *supra*, 26 Cal.4th at p. 926.) Accordingly, we reject the appellate claims.

That said, we consider the issue further in light of C.T.'s claim in his petition for writ of habeas corpus that his counsel rendered ineffective assistance in failing to move to suppress the evidence as being impermissibly suggestive and unreliable in violation of his due process rights. As above, in making this habeas claim, C.T. relies on the appellate record, mainly the record of his jurisdictional hearing, and the declaration from his delinquency attorney stating that she did not challenge the identification evidence on constitutional grounds because she did not think such a challenge would be meritorious. Again, we find C.T. fails to establish a prima facie case for relief.

It is settled that "trial counsel is not required to make frivolous or futile motions, or indulge in idle acts." (*People v. Reynolds* (2010) 181 Cal.App.4th 1402, 1409.) " ' "In order to determine whether the admission of identification evidence violates a defendant's right to due process of law, we consider (1) whether the identification

procedure was unduly suggestive and unnecessary, and, if so, (2) whether the identification itself was nevertheless reliable under the totality of the circumstances. . . .” ’ ” (*People v. Thomas* (2012) 54 Cal.4th 908, 930–931.) C.T. bears the burden of demonstrating the identification procedure was unduly suggestive. (*In re Carlos M.* (1990) 220 Cal.App.3d 372, 386 (*Carlos M.*).)

Here, C.T. fails to show or allege facts establishing that the identification procedure was unduly suggestive such that a motion to suppress would have been granted. There is nothing in the petition or in the record of the jurisdictional hearing indicating the police did anything to cause any of the males to stand out in an unduly suggestive manner. (*People v. Yeoman* (2003) 31 Cal.4th 93, 124 [“To determine whether a procedure is unduly suggestive, we ask ‘whether anything caused defendant to “stand out” from the others in a way that would suggest the witness should select him’ ”].) What the record of the jurisdictional hearing reveals is the police showed C.T. to the victim and her companion while C.T. was standing beside another subject, then showed them a third male. The police illuminated the suspects with a spotlight, and the victim indicated the police admonished her prior to the show-up to say how sure of her identification she was. Show-ups—even single person show-ups—for purposes of in-field identification are not inherently unfair and are encouraged. (*People v. Ochoa* (1998) 19 Cal.4th 353, 413; *Carlos M.*, *supra*, 220 Cal.App.3d at p. 387.) The use of the spotlight seems reasonable given the hour, and C.T. fails to show or allege facts establishing this rendered the procedure unduly suggestive. (See, e.g., *Carlos M.*, *supra*, 220 Cal.App.3d at p. 386 [“[T]he mere presence of handcuffs on a detained suspect is not so unduly suggestive as to taint the identification”].)

Nor, as C.T. contends, was the in-field show-up unduly suggestive because police asked the victim for her phone access code prior to transporting her to where the males were being detained, thereby “strongly implying that they had recovered her phone from these boys and captured the correct trio.” Asking the victim for her phone access code

did not suggest the guilt or innocence of any of the males specifically, and notably, the police returned the victim's phone to her *after* the in-field show-up.

In sum, we deny C.T.'s petition for writ of habeas corpus. C.T. fails to establish a prima facie case for ineffective assistance based on counsel's failure to move to suppress the in-field identification as unduly suggestive and unreliable. In so concluding, we also reject C.T.'s related habeas claim that counsel rendered ineffective assistance by not moving to suppress the in-court identification, which was allegedly tainted by the in-field show-up.

3. Sufficiency of the Evidence for Second Degree Robbery

Last, C.T. contends on appeal that there was insufficient evidence he was one of the perpetrators of the robbery because the identification evidence was unreliable.

In an appeal "challenging the sufficiency of the evidence to support a juvenile court judgment sustaining the criminal allegations of a petition made under the provisions of section 602 of the Welfare and Institutions Code, we must apply the same standard of review applicable to any claim by a criminal defendant challenging the sufficiency of the evidence to support a judgment of conviction on appeal. Under this standard, the critical inquiry is 'whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' [Citation.] An appellate court 'must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' " (*In re Ryan N.* (2001) 92 Cal.App.4th 1359, 1371 (*Ryan N.*).)

Viewing the record as a whole, we conclude there is evidence that is reasonable, credible, and of solid value to support a finding that C.T. perpetrated the robbery. The victim identified C.T. in court, stating she recognized him as one of the perpetrators who grabbed her arm while her phone was being taken, and also grabbed her purse. The

victim testified she recognized C.T.'s face and eyes from when she saw him during the robbery, not the in-field show-up. The record does not support C.T.'s claim that the victim identified him in court merely because the prosecutor prompted her to. Nor does the record support C.T.'s assertion that the victim's in-court identification was influenced by the prosecutor showing her a picture of him and telling her it was a picture "of the subject." Indeed, this occurred after the victim already identified him in court. The fact that the victim's companion did not identify C.T. in court does not impact the reliability of the victim's in-court identification.

In addition, the victim identified C.T. during the in-field show-up which occurred about half an hour after the robbery. The victim testified that during the robbery she clearly saw the perpetrators' faces. While the victim indicated the lighting conditions made it difficult to see the males' facial features at the in-field show-up, she identified the male wearing the GAP sweatshirt (C.T.) as one of the perpetrators who grabbed her when her phone was taken. The victim's companion also identified C.T. during the in-field show-up, though that identification was based solely on his recognition of the GAP logo on C.T.'s sweatshirt. As discussed, the in-field identification procedure used here was not unduly suggestive.

Beyond the identification evidence, C.T.'s identity as one of the perpetrators is further supported circumstantially by other evidence: the males the officers stopped matched the general description of the suspects provided by the victim and her companion; the males were found less than a mile from the scene of the robbery and within half an hour of its 1:00 a.m. occurrence; the males were essentially the only pedestrians in the vicinity; and one of them had the victim's phone. These circumstances supported the inference that C.T. and the two other males acted together in robbing the victim. (*Ryan N., supra*, 92 Cal.App.4th at pp. 1372–1373.)

Considering the record as a whole, we conclude substantial evidence supported the finding that C.T. committed the robbery.

DISPOSITION

The orders of the juvenile court are affirmed. The petition for writ of habeas corpus is denied.

_____
Fujisaki, J.

WE CONCUR:

_____
Siggins, P.J.

_____
Petrou, J.

A153763; A155371